Supreme Court, U.S.
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No. _____ 08-16 JUN 26 2008

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In The

Supreme Court of the United States

PHILIP FEREGA,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Frequently in Driving Under the Influence (DUI) cases, potential Defendants are asked to perform field sobriety tests. Georgia does not require the performance of such tests and submission to such performance is voluntary.

In this case the relevant facts are undisputed. On December 7, 2003, Petitioner was stopped on Ga. Hwy. 400 in Forsyth County, Georgia by an officer of the Forsyth County Sheriff's Department. The arresting officer administered an HGN (horizontal gaze nystagmus) field sobriety test. The arresting Officer then asked Petitioner to submit to the Alco-Sensor field sobriety test as well as the Walk and Turn field sobriety test and the One Leg Stand field sobriety test. Petitioner asked the officer if those tests were voluntary. Petitioner was told by the officer that the tests were voluntary and Petitioner declined to submit to such tests.

The matter was tried and Petitioner was convicted in a bench trial during which the Court considered the evidence of Petitioner's refusal to submit to the field sobriety tests.

The question presented is, therefore:

Under what circumstances, if any, may the exercise of a right be considered as incriminating in a criminal case?

PARTIES TO THE PROCEEDING

Philip Ferega (*Petitioner* in this Court)

State of Georgia (*Respondent* in this Court)

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PETITION FOR WRIT OF CERTIORARI

Philip Ferega respectfully petitions for a Writ of Certiorari to review the Judgment of the Georgia Court of Appeals and as to which Certiorari was denied by the Supreme Court of Georgia, the Georgia Court of last resort. The Georgia Court of Appeals erroneously determined that Petitioner's exercise of the right to not submit to field sobriety tests in a DUI investigation could be considered as evidence of guilt.

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is reported as *Ferega v. State*, 286 Ga. App. 808, 650 S.E.2d 286 (2007). (Appendix A). The opinion of the Georgia Supreme Court denying Certiorari on January 28, 2008 is not reported (Appendix B) and the decision of the Georgia Supreme Court denying rehearing of Petition for Writ of Certiorari on March 31, 2008 is not reported (Appendix C).

JURISDICTION

Jurisdiction is based upon denial of rights protected by the Fifth and Fourteenth Amendments to the United States Constitution. The Georgia Court of Appeals issued its decision on June 29, 2007. The Georgia Supreme Court denied Petitioner's *Petition for Writ of Certiorari* on January 28, 2008. Petitioner properly submitted a Motion for Reconsideration to

the Georgia Supreme Court. This Petition is timely filed within ninety days of the Georgia Supreme Court's denial of Petitioner's Motion For Reconsideration on March 31, 2008.

CONSTITUTIONAL AND/OR STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the United States Constitution provides as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Background

Petitioner, Philip Ferega, was convicted in a bench trial in the State Court of Forsyth County, Georgia of the misdemeanor offense of Driving Under the Influence[1] based in part upon the Court's consideration of Petitioner's refusal to submit to a series of voluntary field sobriety tests and as to which Petitioner had been told were voluntary.

B. The Proceedings

This appeal is from the State Court of Forsyth County, Georgia following a verdict of guilty in a bench trial. Petitioner was accused by accusation by the Solicitor General of Forsyth County and charged with the offenses of Driving under the Influence (O.C.G.A. § 40-6-391), Failure to Maintain Lane (O.C.G.A. § 40-6-48), both misdemeanor offenses.

---

[1] O.C.G.A. § 40-6-391

The case proceeded to bench trial on, April 28, 2005 and May 6, 2005. Petitioner was convicted and thereafter was sentenced. Petitioner then filed his Notice of Appeal to the Georgia Court of Appeals

Facts presented in the State's case and relevant to the question presented show the following:

On December 7, 2003, Petitioner was stopped on Ga. Hwy. 400 in Forsyth County, Georgia by use of blue lights by a uniformed officer of the Forsyth County Sheriff's Department (T.49). The arresting officer asked Petitioner to step out of the car and the officer then administered an HGN (horizontal gaze nystagmus) field sobriety test. The officer detected the "strong" odor of alcohol.

The arresting Officer then asked Petitioner to submit to the Alco-Sensor field sobriety test as well as the Walk and Turn test and the One Leg Stand test. Petitioner asked if those tests were voluntary. Petitioner was told by the officer that the tests were voluntary and Petitioner declined to submit to such tests. Petitioner was arrested and charged with Driving Under the Influence The Georgia Court of Appeals issued its decision on June 29, 2007. The Georgia Supreme Court denied Petitioner's *Petition for Writ of Certiorari* on January 28, 2008. Petitioner properly submitted a Motion for Reconsideration to the Georgia Supreme Court. This Petition is timely filed within ninety days of the Georgia Supreme

Court's denial of Petitioner's Motion for Rehearing on March 31, 2008.

REASONS FOR GRANTING THE PETITION

The question raised by this Petition – as set forth above – is a matter of great concern and importance to the public, as it directly affects, *inter alia,* at least two fundamental rights as perceived by the American public, (1) the right to remain silent and (2) the right to not incriminate oneself and the right to not have the exercise of those rights held against you.

Specific guidance is necessary to preserve the balance between vigorous prosecution and the protection of individual constitutional rights.

A review of existing law and principles involved will illustrate the necessity of providing such guidance and protection.

As set forth in the Facts above, it is undisputed that Petitioner was stopped by a law enforcement officer who then administered one field sobriety test (HGN) and then asked Petitioner to perform additional field sobriety tests. Petitioner inquired and was told such tests were voluntary and Petitioner then declined to perform such tests. Petitioned was then arrested and charged, *inter alia*, with the offense of Driving Under the Influence.

This Petition rests only upon Federal constitutional grounds pursuant to the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner contends that there is no dispute that field sobriety tests are voluntary in Georgia and that since the tests are voluntary, Petitioner had the right to not take the tests.

Petitioner then contends that the exercise of a right may not be incriminatory because it otherwise leaves no way to avail oneself of a right other than by incriminating oneself and is thus a denial of due process as being fundamentally unfair. Fundamental fairness is "the touchstone of due process." *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). See, Fifth and Fourteenth Amendments to the United States Constitution.

The Georgia Court of Appeals in its opinion failed to recognize the Hobson's choice presented to Petitioner. Submit to the voluntary tests and perhaps incriminate one's self or decline and have that decision used against you as incriminating evidence.

GRIFFIN V. CALIFORNIA

The Georgia Court of Appeals in its opinion overlooked and did not consider the analysis of the United States Supreme Court in *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229 (1965):

> "Petitioner was convicted of murder in the first degree after a jury trial in a California

> court. He did not testify at the trial on the issue of guilt, though he did testify at the separate trialn1 on the issue of penalty. The trial court instructed the jury on the issue of guilt, stating that a defendant has a constitutional right not to testify. But it told the jury:n2
>
> "As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable." " (Footnote omitted)

In *Griffin,* Griffin simply exercised his right to not testify.

The United States Supreme Court in *Griffin* expressly held that it was unconstitutional for a prosecutor or trial judge to make adverse comment upon a defendant's failure to testify in a state criminal trial. Such comment (*or as Petitioner contends admission into evidence*) constitutes a constitutionally forbidden penalty for exercising a constitutional privilege as follows:

> We said in *Malloy v. Hogan*, supra, p. 11, that "the same standards must determine whether an accused's silence in either a

> federal or state proceeding is justified." **We take that in its literal sense *and hold*** that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, **forbids either comment by the prosecution on the accused's silence *or instructions by the court that such silence is evidence of guilt*.**n6 (**Emphasis *added*** and footnote omitted)

Of course in the instant case there was a bench trial with no jury instructions but the trial court did indicate that it could consider (self-instruction) Petitioner's refusal.

Petitioner Ferega was presented with the "Hobson's choice" of potentially incriminating himself or suffering a penalty by having his refusal used against him and the State cannot constitutionally make good on its threat to penalize him by using his choice against him.

FOURTH AMENDMENT ANALOGY

The Georgia Court of Appeals additionally failed to consider an analogous situation as set forth in *Mackey v. State*, 234 Ga. App. 554, 507 S.E.2d 482 (1998) which observed:

> A defendant's refusal to consent to a warrantless search of his vehicle or other property is quite a different issue. **A refusal of permission to search is analogous to the**

> **assertion of the privilege against self-incrimination.** It is forbidden to "parade [a witness] in front of the jury for the sole purpose of having him invoke the Fifth Amendment. [Cit.]" Sweat v. State, 226 Ga. App. 88, 89(2) (485 S.E.2d 259) (1997). **By analogy, an individual should be able to invoke his Fourth Amendment rights without having his refusal used against him at trial.** (**Emphasis** added)

There is no rational reason to have this rule for the Fourth Amendment rights and to not have it for the right to remain silent and not incriminate oneself.

Petitioner's position is also supported by *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978):

> "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, see *North Carolina v. Pearce*, supra, at 738 (opinion of Black, J.), and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional." *Chaffin v. Stynchcombe*, supra, at 32-33, n. 20. See *United States v. Jackson*, 390 U.S. 570."

Although *Bordenkircher* addressed prosecutorial vindictiveness in the context of reindictment, Petitioner asserts that the principle of *Bordenkircher* applies in the instant matter and Petitioner is being punished for exercising his legal rights (to refuse field

sobriety tests) when a prosecutor tenders evidence of the exercise of that right and the Court uses it as evidence against Petitioner. *See, North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

CONCLUSION

For the above and forgoing reasons the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FEREGA v. THE STATE.

1.

A07A0603.

2.

COURT OF APPEALS OF GEORGIA

286 Ga. App. 808; 650 S.E.2d 286; 2007

June 29, 2007, Decided

Counsel:

Banks & Stubbs, Rafe Banks III, for appellant. Leslie C. Abernathy, Solicitor-General, for appellee.

Judges:

ADAMS, Judge. Andrews, P. J., and Ellington, J., concur.

OPINION BY: ADAMS

Adams, Judge.

Philip Ferega appeals from the trial court's denial of his motion for new trial after he was convicted in a bench trial of one count of driving under the influence of alcohol and one count of failure to maintain lane. We affirm.

On December 7, 2003, a Forsyth County Sheriffs deputy observed Ferega's car jerk back and forth quickly, then start to drift back and forth between the road's centerline and the fog line, striking the fog line. The officer initiated a traffic stop. As Ferega was

stopping his vehicle, he continued driving in the emergency lane for some distance before coming to a complete stop. When Ferega got out of his car, he was a little unsteady on his feet, and he left the driver's side door open to the roadway. As the two talked, the officer detected a strong odor of alcohol coming from Ferega's facial area. The officer stated that Ferega's eyes were bloodshot and glazed, and his face was pale.

In response to the officer's questions, Ferega admitted that he had consumed alcohol earlier, and the officer noticed that his speech was thick and slurred. Later, the officer observed Ferega stumble, causing him to cross his legs to maintain his balance. With Ferega's permission to look into his eyes, the officer performed the horizontal gaze nystagmus test and observed that Ferega exhibited signs of all six indicators on the test. The officer then asked Ferega to perform the walk and turn test and the one-leg stand test. The officer told Ferega that those tests were voluntary, and he refused to perform them or to submit to the alco-sensor test. During these conversations, Ferega became extremely nervous. Based upon his observations of Ferega and his driving, as well as the indicators from the HGN test, the officer determined that Ferega was under the influence of alcohol to the extent that he was less safe to drive, and he placed Ferega under arrest for DUI. The officer then read Ferega the implied consent warnings, and Ferega later refused to submit to a blood-alcohol test.

Ferega asserts as his sole enumeration of error that the trial court erred in improperly admitting and considering evidence of Ferega's refusal to submit to voluntary field sobriety tests. He asserts that this refusal was a communicative, or testimonial, act subject to Fifth Amendment protection against self-incrimination, whether he was in custody or not. This argument is without merit.

It is well settled that the Fifth Amendment "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." (Citation and punctuation omitted.) *Pennsylvania v. Muniz,* 496 U. S. 582, 589 (II) (110 S. Ct. 2638, 110 LE2d 528) (1990). "In order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." (Citation and punctuation omitted.) Id. It follows, therefore, that evidence that is not testimonial in nature does not fall within the privilege. *Schmerber v. California,* 384 U. S. 757, 761, n. 5 (86 S. Ct. 1826, 16 LE2d 908) (1966). And "[t]he [U. S. Supreme] Court has held repeatedly that the Fifth Amendment is limited to prohibiting the use of 'physical or moral compulsion' exerted on the person asserting the privilege." (Citation and punctuation omitted.) *South Dakota v. Neville,* 459 U. S. 553, 562 (II) (103 S. Ct. 916, 74 LE2d 748) (1983).

Applying these principles, the U. S. Supreme Court determined that the admission of evidence of a

defendant's blood sample does not violate the Fifth Amendment, because such evidence is not testimonial in nature. *Schmerber v. California,* 384 U. S. at 764-765. And the Supreme Court held that the admission of evidence showing that the defendant refused to submit to a blood test was not subject to the privilege against self-incrimination "[s]ince no impermissible coercion is involved when the suspect refuses to submit to take the test, regardless of the form of refusal." (Footnote omitted.) *South Dakota v. Neville,* 459 U. S. at 562 (II).

Likewise, this Court has concluded that the [r]efusal to submit to field sobriety tests . . . is admissible as circumstantial evidence of intoxication and together with other evidence would support an inference that [the suspect] was an impaired driver." (Citations and punctuation omitted.) *Jones v. State,* 273 Ga. App. 192, 194 (1) (b) (614 SE2d 820) (2005). See also *Hoffman v. State,* 275 Ga. App. 356, 358 (1) (620 SE2d 598) (2005). (1) The element of coercion necessary to trigger Fifth Amendment protection was clearly absent in this case where Ferega was specifically told that the tests were voluntary and he refused to take them.

Accordingly, the trial court was entitled to rely upon this evidence, in conjunction with the other evidence at trial, in determining whether Ferega was guilty of DUI. *Bravo v. State,* 249 Ga. App. 433, 434 (1) (548 SE2d 129) (2001). (2) And we find that the evidence of record was sufficient to support Ferega's convictions.

Judgment affirmed. Andrews, P. J., and Ellington, J., concur.

APPENDIX B

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Date: January 28, 2008

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Case No. S07C1856

PHILIP FEREGA v. THE STATE

COURT OF APPEALS CASE NO. A07A0603

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Therese S. Barnes, Clerk

APPENDIX C

SUPREME COURT OF GEORGIA

Case No. S07C1856 Atlanta, March 31, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

PHILIP FEREGA v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Therese S. Barnes, Clerk